



disability. At oral argument before the Board, the issue of the date of the accident was also raised.

### **FINDINGS OF FACT & CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, including the stipulations of the parties, the Board makes the following findings of fact and conclusions of law:

The Administrative Law Judge's Award sets out findings of fact that are accurate and supported by the record. It is not necessary to repeat those findings and conclusions herein. The Board adopts the Administrative Law Judge's findings and conclusions as its own.

The claimant's primary contention is that she is entitled to a work disability as a result of her work-related injury.

It was stipulated that the claimant sustained injury to her right upper extremity on December 1, 1996, and again in a separate incident on January 18, 1997. On February 13, 1997, the claimant was taken off work for a medical condition unrelated to her injuries. The claimant was off work until November 1997. The claimant returned to work in late November or early December 1997.

When the claimant returned to work she was placed in a light-duty dining room job to accommodate her restrictions. The position required claimant to wipe off tables, put place mats on trays and occasionally mop up spills. The heaviest items to lift were the trays and when claimant complained about carrying trays she was advised she could carry fewer trays in order to comply with her restrictions. The claimant's contentions regarding lifting tables was controverted and it was noted that the tables could be pushed across the smooth floors if they needed to be rearranged rather than lifted. The claimant continued to work and perform her job duties.

On January 13, 1998, the claimant was again taken off work for a medical condition unrelated to her injuries. On January 21, 1998, the claimant brought her uniform in to her supervisor and advised him she was quitting.

Dr. Melhorn performed carpal tunnel surgery on the claimant's right wrist and an ulnar nerve decompression on her right elbow on December 28, 1998. The same surgeries were performed on the left on March 15, 1999. The claimant never attempted to return to work for the respondent. During the summer of 1999, the claimant was studying and preparing to enter the ministry and in September 1999 she accepted a full-time position as head minister at the Fall River Christian Church in Fall River, Kansas.

The Kansas Appellate Courts have interpreted K.S.A. 44-510e to require workers to make a good faith effort to continue their employment post injury. The Court has held a worker who is capable of performing accommodated work should advise the employer of his or her medical restrictions and should afford the employer a reasonable opportunity to adjust the job duties to accommodate those restrictions. Failure to do so is evidence of a lack of good faith.<sup>1</sup> Additionally, permanent partial general disability benefits are limited to the functional impairment rating when the worker refuses to attempt or voluntarily terminates a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage.<sup>2</sup>

Likewise, employers are encouraged to accommodate an injured worker's medical restrictions. In so doing, employers must also act in good faith.<sup>3</sup> In providing accommodated employment to a worker, *Foult* is not applicable where the accommodated job is not genuine<sup>4</sup> or not within the worker's medical restrictions,<sup>5</sup> or where the worker is fired after attempting to work within the medical restrictions and experiences increased symptoms.<sup>6</sup> Even returning to one's regular job will not preclude a work disability where the job is only temporary and not offered in good faith.<sup>7</sup>

The evidence in this matter establishes the claimant was provided work within her restrictions and voluntarily terminated her employment with the respondent. Subsequent to her surgeries she chose a career in the ministry and did not return to work for the respondent.

Jane Hollingshead, a vocational rehabilitation counselor, testified that the claimant had the capability to earn from \$6.50 to \$7.50 an hour in the open labor market. The claimant's average weekly wage was \$196.54. Adopting the lower rate of \$6.50 an hour would result in an average weekly wage in excess of the amount the claimant was earning at the time of her injury. It is the Board's determination that claimant retains the capability

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<sup>1</sup> See, e.g., *Oliver v. The Boeing Company-Wichita*, 26 Kan. App.2d 74, 977 P.2d 288, rev. denied \_\_\_\_ Kan. \_\_\_\_ (1999), and *Lowmaster v. Modine Manufacturing Co.*, 25 Kan. App.2d 215, 962 P.2d 1100, rev. denied 265 Kan. 885 (1998).

<sup>2</sup> *Cooper v. Mid-America Dairymen*, 25 Kan. App.2d 78, 957 P.2d 1120, rev. denied 265 Kan. 884 (1998).

<sup>3</sup> *Niesz v. Bill's Dollar Stores*, 26 Kan. App.2d 737, 993 P.2d 1246 (1999).

<sup>4</sup> *Tharp v. Eaton Corp.*, 23 Kan. App.2d 895, 940 P.2d 66 (1997).

<sup>5</sup> *Bohanan v. U.S.D. No. 260*, 24 Kan. App.2d 362, 947 P.2d 440 (1997).

<sup>6</sup> *Guerrero v. Dold Foods, Inc.*, 22 Kan. App.2d 53, 913 P.2d 612 (1995).

<sup>7</sup> *Gadberry v. R.L. Polk & Co.*, 25 Kan. App.2d 800, 975 P.2d 807 (1988), and *Edwards v. Klein Tools Inc.*, 25 Kan. App.2d 879, 974 P.2d 609 (1999).

to earn the same wage she was earning prior to her injury and accordingly is not entitled to a work disability.

The record contains the medical opinions of Drs. Melhorn, Mills and Murati. Dr. Melhorn was the treating physician and performed the surgeries on claimant's arms. Dr. Mills was appointed by the Administrative Law Judge to perform an independent medical examination. Dr. Murati examined the claimant at her attorney's request.

During the litigation of this claim and prior to her surgeries, the claimant was referred to Dr. Mills for a court ordered independent medical examination. The doctor referred the claimant for electrodiagnostic studies which revealed carpal tunnel syndrome. The doctor recommended surgery, did not see the claimant after her surgeries and did not provide a permanent impairment of function rating.

Dr. Murati provided a 28 percent whole person impairment rating according to the Fourth Edition of the *AMA Guides to the Evaluation of Permanent Impairment*. Dr. Murati's rating included a permanent rating to the neck. The treating physician, Dr. Melhorn, limited his rating to each upper extremity which converted to an 8.5 percent whole body functional impairment. The Administrative Law Judge determined that Dr. Melhorn's opinion would be accorded more weight in this case because he was the treating physician and had followed the claimant over the entire extended course of treatment in this case. That finding is adopted by the Board. The claimant has met her burden of proof that as a result of her work-related injuries she has sustained an 8.5 percent whole body functional impairment.

The Administrative Law Judge's determination of the date of accident is adopted for the purpose of this award.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated September 1, 2000, is affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March 2001.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

**Copies to:**

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